COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2014-SC-000443-D

REBECCA CLAYBURN — APPELLANT

V.

APPEAL FROM THE COURT OF APPEALS, KENTUCKY
CASE NO. 2012-CA-001680-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

AND

COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET,
BOARD OF CLAIMS — APPELLEE

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REPLY BRIEF FOR APPELLANT, REBECCA CLAYBURN

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this brief were served upon the following named individuals by first class U.S. mail, postage prepaid, on the 23rd day of November, 2015: Samuel P. Givens Jr., Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. G. Mitchell Mattingly, Kentucky Board of Claims, 130 Brighton Park Blvd, Frankfort, KY 40601; and Hon. Marlin Jones, Kentucky Transportation Cabinet, Office of Legal Services, 200 Mero St., Frankfort, KY 40622

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to rebut arguments made by the Commonwealth of Kentucky Transportation Cabinet in the Brief for Appellee. The failure to address a particular issue should not be taken as a reflection that Appellant believes that the issue has no merit or less merit than issues which have been addressed in this Reply Brief.

ARGUMENTS

I. THE COURT OF APPEALS ERRED WHEN IT ISSUED ITS OPINION WITHOUT HEARING ORAL ARGUMENTS

The Appellee argues that the Court of Appeals acted within its discretion when it issued its opinion without hearing oral arguments, because there is no established right to an oral argument. It is true that there is no established right requiring the Court of Appeals to hear oral arguments, but the Court of Appeals is required to follow the Rules of Civil Procedure. "The procedures for appellate review shall be established by the *Rules of Civil Procedure*.... KRS § 22A.060(2). There is no question that the Court of Appeals did not file a motion to dispense with oral arguments and the failure to file the motion as required by CR 76.16 is a substantial procedural error.

The issue in question is not whether Appellant has a right to an oral argument, but whether the Court of Appeals's error in failing to follow the correct procedure as outlined in Kentucky's Rules of Civil Procedure was substantial or harmless. The Appellee argues that "the Court of Appeals deemed that oral argument was not needed on this case." (Appellee Brief page 13). However, the Court of Appeals's initial granting and scheduling of the oral argument runs counter to that assertion. The Court of Appeals believed, initially, that the inclusion of oral argument was important enough to grant, but then unilaterally,

without following proper procedure and filing its motion, reversed its position. Thus, when the opinion was rendered without following the correct procedure, the Appellant's right to an appeal, granted by KRS § 22A.020, was substantially infringed upon by the Court of Appeals.

II. THE TRANSPORTATION CABINET IS LIABLE FOR ITS DECISION TO STORE MATERIALS IN THE I-65/I-265 GORE

The Appellee argues that the Court of Appeals was right to render its opinion holding that the storage of I-beams in the gore area is a discretionary activity, since there are no rules or regulations pertaining to this matter. To support their argument, Appellee refers to the testimony of Jason Richardson, a Transportation Cabinet Employee. (Appellee Brief page 14). Appellee misconstrues Mr. Richardson's testimony and glosses over the procedures involved with inspection of damaged signs and the installation of new signs. Mr. Richardson testified:

> [D]istrict personnel will drive our interstates and look at every panel sign along the interstate to check for any damage at all, whether it be vehicular or mower damage or whatever, anything that's wrong with the sign.
>
> If we discover any issues, we have a standard form that Frankfort has us fill out. We take a picture of the sign and write down the mile points and the description of the damage.
>
> Upon completion of our inspection, we will take any damage reports for anything that we found, submit to central office and Frankfort maintenance. And upon which time it may take us two or three weeks to get our inspection completed.
>
> And, from that time, once we submit, it'll be two to four weeks for Frankfort to process the paperwork and generate a work order, which they then send to our contractor who has another month or so to generate shop drawings for any signs that need to be replaced.
>
> Those drawings are sent back to Frankfort for approval. Once those drawings are approved, the contractor then has a 180 days to get the sign replaced.

(Hearing Transcript Page 85-86)

Mr. Richardson went on to testify that the contractor, when he goes to make repairs will look at the damaged signs and "will make the determination if those materials are useable". (Hearing Transcript page 95). The understanding being, that it is regular procedure to leave the damaged signs in place until the contractor inspects the sign, then for the contractor to leave any usable materials in place for future construction. The employees has discretion as to whether to leave an I-beam, but the fact that there is a procedure in place which will leave *any* hidden, dangerous I-beam demonstrates the ministerial nature of this activity.

Appellee quotes this Court's ruling in Commonwealth Department of Highways v. Sexton "an act may be ministerial even if that act is not specifically covered by applicable statutes, or administrative regulations." 256 S.W.3d 29, 33 (Ky. 2008). Appellee argues that this occurs only when an inherently dangerous condition exists and the Cabinet has knowledge of the condition. Appellee then claims that the procedures in place, as described above, do not create a defective or dangerous condition. (Appellee Brief page 16). Appellant's broken teeth and injuries to her right jaw, upper neck, both hands, and right hip caused be the I-beam ripping through the floor of her vehicle and shooting through the speedometer tells a different story as to the danger present. (Hearing Transcript pages 20 and 16). Further, the Transportation Cabinet not only knew of the condition, but created it through the procedures in place for replacing signs and concealed it through its grounds keeping procedures. (Hearing Transcript pages 116-7).

III. THE TRANSPORTATION CABINET HAS A DUTY TO KEEP THE GORE FREE OF OBSTRUCTION OR TO WARN OF OBSTRUCTION.

Appellee argues that the history and precedents set by this Court and its predecessor concerning roadside hazard has been to limit the duty owed to motorists to the roadway

and the area immediately adjacent to it, which the Appellee concludes is limited to the shoulder. (Appellee Brief page 17). The purpose of the decisions discussed is to protect the traveling public, not the Transportation Cabinet by limiting protections. The gore that is the subject of this appeal has no shoulder to speak of and as testified to there was nowhere else for the Appellant to go when she was forced off the road except into the gore. (Hearing Transcript pages 12, 65, and 79). The gore area in question is the essence of what the old Kentucky Court of Appeals was determined to keep safe when it held that the duty to keep streets and "such parts of its streets as lie immediately adjacent to or in the margin of the traveled part" in a reasonably safe condition. City of Lancaster v. Broaddus, 216 S.W. 373, 375 (Ky. 1919). Here, the Transportation Cabinet created the danger then made no attempt to even warn that there was a dangerous condition hidden in the grass.

The Appellee's implication that I-Beam sign construction materials and the procedures used which leave them laying, hidden in the grass has no connection to the construction or maintenance of the road is flawed as well. (Appellee Brief page 20). The gore in question is owned, maintained, and used as storage for I-beams used in the construction of highway signs. The record fails to determine with certainty whether the sign components in question were examined and deemed reusable or if they were unusable wreckage before the subject accident. If the Appellee asserts by inference that an examination of the sign was done according to the procedures set forth above, why did the Transportation Cabinet not use reasonable care and consolidate and mark the position of reusable sign components to minimize the possibility that an unaware driver, in this case, the Appellant, hitting the debris and being injured. There is an unquestionable relationship in this matter between the I-beams and the construction and maintenance of the roads. As the Appellee points out

KRS 176.050 establishes the duty to "[i]nvestigate all problems relating to the construction and maintenance of roads in the state." (Appellee Brief page 20).

CONCLUSION

The Court of Appeals must follow the Rules of Civil Procedure and their failure to do so in this instance significantly infringed upon the Appellant's right to an appeal. The Transportation Cabinet set up regular procedures for the replacement of damaged signs which leads to employees being required to leave undamaged sign components in the gore area, but the record does not conclusively demonstrate whether the procedures were followed in this instance. Further, The Transportation Cabinet has a duty to keep the roadways and areas adjacent to roadways safe for the traveling public, which in this case includes the gore which was immediately adjacent to the highway.

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